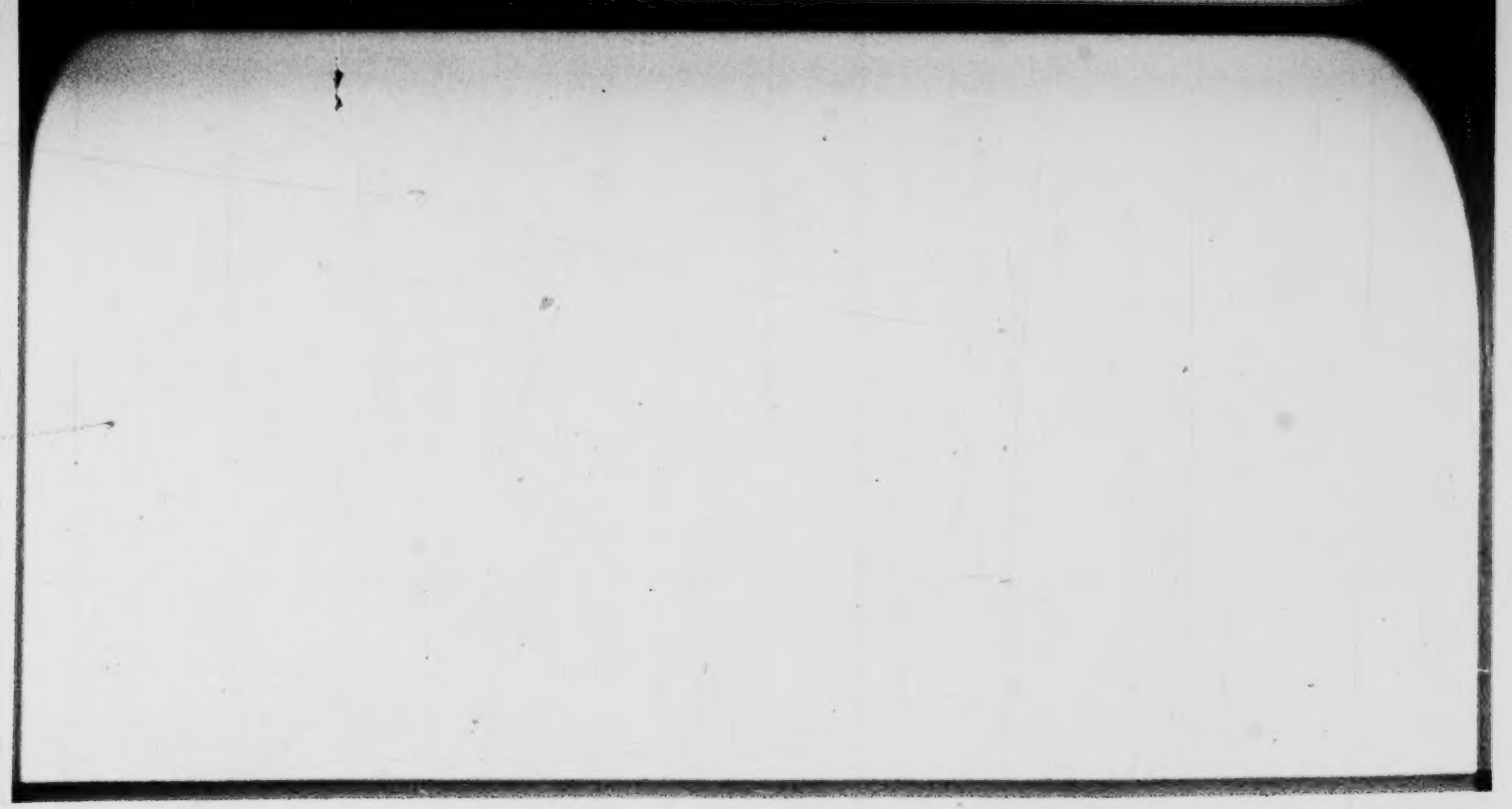

No. 71-626

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1971

ROBERT J. LEHNHAUSEN,
Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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LIST OF AUTHORITIES CITED

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INTEREST OF AMICUS

With the consent of all parties involved in the proceedings before this Court in *Lehnhausen* v. *Lake Shore Auto Parts*, No. 71-685, Richard B. Ogilvie, Governor of the State of Illinois, files this Brief in support of the Petition for Certiorari.

As chief executive officer of the State, the Governor of Illinois not only has the responsibility faithfully to execute the laws but also to plan and implement a sound and fair taxation program that will ensure the financial integrity of the State. As a principal part of this program, the Governor advocated, and the people of the State of Illinois approved by constitutional referendum, the abolition of the personal property tax as it relates to individual persons.

The invalidation of the constitutional amendment by the Illinois Supreme Court, solely on Federal constitutional grounds, has undermined the Governor's taxation program

and has perpetuated in Illinois a tax that is almost universally conceded to be inequitable and impossible to administer fairly. Unless the judgment of the Illinois Supreme Court is reversed, state governments will be placed in a Federal constitutional strait jacket, unable to develop fair and effective taxation programs. Moreover, legislatures in other States may be seriously misguided in the development of their taxation programs if they proceed under the influence of the Illinois Court's erroneous view of Federal constitutional law.

The majority opinion of the Illinois Supreme Court, relying solely upon Federal constitutional grounds, placed substantial restrictions on the State's taxation powers which seriously impair the power of both the legislature and the people of the State by constitutional amendment to make rational classifications for taxation purposes. Only this Court can correct this erroneous interpretation of Federal constitutional law and remove the improper restrictions imposed by the Illinois Court, under color of Federal constitutional law, upon the State's taxation program.

QUESTION PRESENTED

Whether the Illinois Supreme Court Erred in Holding, Contrary to the Controlling Decisions of This Court, That Abolition of the Personal Property Tax Upon Individuals But Not Upon Corporations, by Means of a State Constitutional Amendment, Created an Unreasonable and Invidious Discrimination Between Individuals and Corporations in Violation of the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

On November 3, 1970, the people of the State of Illinois approved an amendment to the State's 1870 Constitution (Article IX-A) which stated in pertinent part that "[n]otwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*" (Emphasis in original.)

This suit was brought by a corporate taxpayer challenging the constitutionality of the constitutional amendment on the grounds, *inter alia,* that removing the personal property tax burden from individuals, but maintaining that burden upon corporate taxpayers,* constituted invidious discrimination against corporations in violation of the Equal Protection Clause of the Fourteenth Amendment. A majority of the Illinois Supreme Court sustained this contention, holding that, at least for the purpose of the imposition of an *ad valorem* personal property tax, no rational distinction could be drawn between individuals (i.e., natural persons) and corporations; hence, to relieve one class alone of the tax burden constituted a violation of the Equal Protection Clause.

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* Under the new 1970 Illinois Constitution, the legislature must abolish *all* personal property taxes on or before January 1, 1979. The new Constitution provides that any personal property tax abolished before the effective date of the Constitution (July 1, 1971) may not be reinstated. 1970 Ill. Const., art. IX, § 5(b). This provision was added in contemplation that personal property taxes on individuals would be effectively terminated by Article IX-A of the 1870 Constitution.

REASONS FOR GRANTING THE WRIT

The Illinois Supreme Court Erred in Holding, Contrary to the Controlling Decisions of This Court, That Article IX-A of the 1870 Illinois Constitution, Which Abolished the Personal Property Tax as to Individuals But Not as to Corporations, Created an Unreasonable and Invidious Discrimination Between Individuals and Corporations in Violation of the Equal Protection Clause of the Fourteenth Amendment

The general principles applicable to the instant case are relatively clear, although their application in the present case produced a sharp division in the Illinois court. The prevailing judgment and decision, invalidating the state constitutional amendment, are not consistent with the often-expressed views of this Court.

The applicable principles regarding the validity of state taxation statutes under the Equal Protection Clause have been frequently reiterated by this Court. Thus, for example, in *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959), this Court stated the following:

> "•••The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in divising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to

close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted.] 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co.* v. *Conway*, [281 U.S. 146, 159]." 358 U.S. at 526-527.

More generally, this Court has frequently noted that a classification is not arbitrary or violative of the Equal Protection Clause if *any* state of facts reasonably can be conceived that would sustain the classification. E.g., *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Thus, the question presented in the instant case reduces to this—whether any rational distinction can be drawn between corporations and individuals so as to justify the imposition of a personal property tax (or, indeed, any other tax) upon the corporations but not upon the individuals.

This Court has long taken cognizance of the fact that the corporate structure yields advantages which justify the imposition of higher or different taxes upon corporations, as opposed to individuals. This Court has noted that

> "[t]hese advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships." *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 162 (1911) (excise tax upon corporations measured by net income sustained).

Because of these advantages, this Court has therefore held, in numerous circumstances, that taxes may be imposed upon corporations, as opposed to individuals, or upon certain types of corporations, as opposed to other types of corporations and individuals. Thus, for example, in *White River Co.* v. *Arkansas*, 279 U.S. 692 (1929), this Court sustained a statute imposing back taxes upon corporations if their property had previously been undervalued over the constitutional objection that the reassessment provisions were not applicable to natural persons.

The *White River* case is the first of several cases* which undermined the authority of *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928) (Holmes, Brandeis, and Stone, JJ., dissenting), striking down a state corporate gross receipts tax on equal protection grounds. *Quaker City*, therefore, stands as a relic from an earlier period in which this Court, with some frequency, struck down state regulatory and taxation statutes on Fourteenth Amendment grounds. The majority of the Illinois Court apparently recognized this fact by relying upon, although misapplying, the *dissenting* opinion of Mr. Justice Brandeis in *Quaker City*. The Illinois Court erred in failing to recognize that Mr. Justice Brandeis in fact took the position that a rational basis did exist for distinguishing between corporate and individual taxpayers, citing *Flint* v. *Stone Tracy Co.*, *supra*:

> "There, as here, the tax was imposed merely because the owner of the business was a corporation, as distinguished from an individual or a partnership. There, as here, the character of the owner was the sole fact on which the distinction was made to depend. There, as

* E.g., *Lawrence* v. *Tax Comm'n*, 286 U.S. 276 (1932); *Bekins Van Lines* v. *Riley*, 280 U.S. 80 (1929); *Commonwealth* v. *Life Assurance Co.*, 419 Pa. 370, 214 A.2d 209 (1965), *appeal dismissed*, 384 U.S. 268 (1966).

> here, the discrimination was not based on any other difference in the source of the income or in the character of the property employed." 277 U.S. at 411.

See, in addition, *Fort Smith Lumber Co.* v. *Arkansas*, 251 U.S. 532 (1920) (Holmes, J.) (State may discriminate between corporations and individuals by making former liable to be taxed on shares held in other corporations, themselves fully taxed, while leaving individuals free from such liabilities); cf. *Atlantic Coast Line* v. *Daughton*, 262 U.S. 413, 423-424 (1923). See also *Crescent Oil Co.* v. *Mississippi*, 257 U.S. 129, 137 (1921).

In *Nashville, Chattanooga & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1940), this Court sustained the assessment of an *ad valorem* property tax upon both tangible and intangible property which was assessed differently with respect to (and with greater liability upon) public service corporations than upon all other taxpayers. In addition, see, *e.g.*, *Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 578-579 (1938). See also *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959); *Charleston Ass'n* v. *Alderson*, 324 U.S. 182, 190-191 (1945).

Not only have the States, consistently with the Equal Protection Clause, been permitted to distinguish, for taxation purposes, between individuals and corporations and between corporations of various types, but the States have been permitted, if their policy so dictated, to exempt entirely from taxation (including *ad valorem* property taxation) particular property based upon the nature of the owner of the property. Cf., *e.g.*, *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937); *Randolph* v. *Simpson*, 410 F.2d 1067, 1069 (5 Cir. 1969). The most recent case in this area is *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970), in which this Court sustained state property tax exemptions for institutions and facilities owned by religious and other charitable organizations.

As previously stated, there are substantial differences between corporations and individuals, and the "Constitution does not require things different in fact . . . to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). While all personal property taxes are to be eliminated in Illinois on or before the beginning of 1979, the people of Illinois, by constitutional amendment, chose to recognize "degrees of evil" (*Truax* v. *Raich*, 239 U.S. 33, 43 (1915)) and to eliminate the tax in the first instance upon individuals who do not enjoy the advantages which flow from ownership of property in a corporate form.

The majority of the Illinois Supreme Court were persuaded that, because the tax in question was a property tax, a valid classification under the Equal Protection Clause could not be based upon the character of the owner.* Not only did the Illinois Court cite no authority for the talismanic quality which it ascribed to the property tax, but, as previously indicated (pp. 5-7, *supra*), its view is not consistent with that adopted by this Court.

Moreover, as this Court has indicated, the practical oper-

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* "The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property." 49 Ill.2d at 148, 273 N.E.2d at 598.

The Illinois Court further stated:

> "When classifications are reasonable it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax." 49 Ill.2d at 149-150, 273 N.E.2d at 598.

ation of a statute, rather than the form of words used therein, constitutes the critical factor in determining the constitutionality of such a statute. E.g., *Lawrence* v. *Tax Comm'n*, 286 U.S. 276, 280 (1932) (statute taxing individuals, but not domestic corporations, on income derived from activities outside state held not unconstitutional). In substance, a property tax is not imposed upon inanimate property, but rather upon the persons who own that property, who exercise the right to hold and enjoy the fruits of that property. There is therefore no reason why, for the purposes of the Fourteenth Amendment, the type of ownership of property—be it corporate or individual—cannot provide a rational basis for classification. If corporations and individuals may be classified differently with respect to their right to receive or earn income,* for example, then there is no basis in reason why they cannot also be classified rationally with respect to the taxation of their right to own, control and enjoy the fruits of personal property.

In summary, therefore, the amicus contends (1) that there is a rational basis to distinguish between individuals and corporations in regard to the imposition of the personal property tax because of the basic differences between these two types of entities and the advantages which the corporate form of ownership affords; and (2) that there is no reasonable basis to distinguish between the property tax and other forms of taxation where distinctions between individuals and corporations have consistently been sustained by this Court over constitutional objections.

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*Both the Illinois Supreme Court and this Court have held that individuals and corporations may be distinguished in the burden of the income tax which each type of entity must bear. E.g., *Lawrence* v. *Tax Comm'n*, *supra*; *Thorpe* v. *Mahin*, 43 Ill.2d 36, 250 N.E.2d 633 (1969).

CONCLUSION

For all of the foregoing reasons, the amicus respectf
urges that the Petition for a Writ of Certiorari in
71-685 be granted and that the judgment of the Supre
Court of Illinois be reversed.

Respectfully submitted,

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